



Case Western Reserve Journal of International Law

Volume 41 | Issue 1

2009

Disrupting Terrorist Financing with Civil Litigation

Jack D. Smith

Gregory J. Cooper

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Jack D. Smith and Gregory J. Cooper, *Disrupting Terrorist Financing with Civil Litigation*, 41 Case W. Res. J. Int'l L. 65 (2009)
Available at: <https://scholarlycommons.law.case.edu/jil/vol41/iss1/4>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

DISRUPTING TERRORIST FINANCING WITH CIVIL LITIGATION

Jack D. Smith* & Gregory J. Cooper†

While the direct costs of mounting individual terrorist attacks are relatively low, maintaining a terrorist network is an expensive undertaking. To promote a veil of legitimacy, large terrorist organizations must spend tens of millions on propaganda and ostensibly legitimate social or charitable activities such as hospitals, schools and other public works. They raise the money largely through fundraising efforts worldwide, including “witting and unwitting” contributions from mosques, non-governmental organizations, wealthy donors, and charitable foundations. Criminal prosecutions alone have not stopped such contributions because of insufficient prosecutorial resources and the high standards of proof required for criminal convictions. Unleashing legions of private attorneys to pursue civil actions against individuals and organizations, including charities and banks, involved in the chain of terrorist financing may be a much more credible deterrence, especially when combined with the triple damages provisions of 18 U.S.C. 2333 (a).

INTRODUCTION

The international community has taken numerous steps to thwart terrorism in the wake of the September 11, 2001 attacks in New York City and Washington, D.C. Most of these can be grouped under the four principles laid out in the Counter-Terrorism Strategy adopted by the European Union in 2005: “Prevent, Protect, Pursue, and Respond.”¹ But perhaps the

* Jack D. Smith is a consultant on asset recovery and anti-money laundering issues. He was the Deputy General Counsel of the Federal Deposit Insurance Corporation in Washington, D.C. for 16 years where he oversaw the recovery of \$6 billion owed to failed banks, after which he founded the International Centre for Asset Recovery (ICAR) in Basel, Switzerland in 2006. Now living in Basel, Mr. Smith has authored a number of articles, including “The Recovery of Stolen Assets: A Fundamental Principle of the United Nations Convention on Corruption” for the U4 Anti-Corruption Resource Center, available at http://www.u4.no/themes/uncac/documents/U4Brief2_2007_asset-recovery.pdf.

† Gregory J. Cooper is a graduate of the College of William and Mary, Williamsburg, Virginia, and is researching state cooperation in asset recovery cases. He studied anti-corruption strategies under Professor Jon S.T. Quah at the National University of Singapore, and is currently a Fulbright Scholar at the Basel Institute of Governance, Basel, Switzerland.

¹ See Council of the European Union, *The European Union Counter-Terrorism Strategy*, 14469/4/05 REV 4 (Nov. 30, 2005), available at <http://www.nederlandineuropa.nl/documenten/Veiligheid/The%2520EU%2520counter-terrorism%2520strategy.pdf>.

one that will prove most effective for suppressing terrorism over the long term is the severing of funding and support networks, which the European Union categorizes under the "Pursue" principle.

As recently stated by the Financial Action Task Force (FATF), "[d]isrupting funding flows creates a hostile environment for terrorism, constraining the overall capabilities of terrorists and helping frustrate their ability to execute attacks."² Governments invariably turn first to their criminal procedures to attack terrorist financial networks. However, our research and experience indicates that civil procedures may often be an even more effective tool to stop the financing of terrorism.

Part I of this article describes the vital importance of donations from sympathizers to large terrorist organizations and posits that the best way to dry up those funds is to freeze and confiscate the wealth of people who finance murder and terror. Part II describes some of the historical difficulties in recovering the assets of crime and corruption hidden overseas, and explains how the situation has improved since 2005 when the United Nations Convention against Corruption came into effect. Part III discusses the power, scope and legal issues surrounding 18 U.S.C. 2333(a), a 1992 statute that provides a civil remedy to victims of terrorism to recover damages from terrorists and those that provide them material support. Part IV discusses recent section 2333(a) filings against banks and private companies, as well as other civil court remedies useful in the fight against terrorist organizations. Our conclusion is that widening avenues for private attorneys to seek damages in the civil courts may prove to be the most effective weapon of all against the spread of terrorism.

I. WHY PURSUE ASSETS?

Terrorist organizations do not need a lot of money to build bombs. The 2002 Bali Bombings by Jemaah Islamiya cost approximately \$50,000, and the 2004 Madrid attacks by an Al Qaeda inspired terrorist cell cost approximately \$10,000.³ Trying to detect and thwart transfers of such small amounts is generally a fruitless exercise. Gary M. Osen, a New Jersey attorney who is leading a series of high profile terrorist financing actions against banks, aptly compares it with "trying to shut down the phone company by going to people's homes and apartments and individually smashing their phones instead of destroying the satellites and cables that conduct the signals."⁴

² FINANCIAL ACTION TASK FORCE, TERRORIST FINANCING 4 (2008), *available at* <http://www.fatf-gafi.org/dataoecd/28/43/40285899.pdf>.

³ FINANCIAL ACTION TASK FORCE, *supra* note 2, at 7.

⁴ Robin Finn, *Cutting Off Terror's Money Supply*, N.Y. TIMES, Aug. 17, 2007, at B4.

The Financial Action Task Force (FATF) is an inter-governmental body composed of thirty-two countries and two regional organizations.⁵ Established in 1989, its mission is the “development and promotion of national and international policies, to combat money laundering and terrorist financing.”⁶ In February 2008, the FATF released a report on Terrorist Financing,⁷ which noted that although most direct terrorist operations require only tens of thousands of dollars, those expenses are just the tip of the financial iceberg.⁸ There is a much larger requirement for funding which lays unseen under the water in the form of broader organizational requirements:

Funds are required to promote a militant ideology, pay operatives and their families, arrange for travel, train new members, forge documents, pay bribes, acquire weapons, and stage attacks. Often, a variety of higher-cost services, including propaganda and ostensibly legitimate social or charitable activities are needed to promote a veil of legitimacy for organizations that promote objectives through terrorism.⁹

As an example, the Central Intelligence Agency (CIA) estimates that Al Qaeda spent about \$30 million a year to sustain its activities before September 11, 2001.¹⁰ Contrary to popular belief, Osama bin Laden did not use his personal wealth, which he inherited from the Bin Laden construction company when his father passed away. Instead, Al Qaeda’s activities were supported largely through fundraising efforts worldwide, including “witting and unwitting” contributions from mosques, non-governmental organizations, internet users, wealthy donors, and charitable foundations.¹¹

These contributions constitute the life blood of large terrorist organizations. They are essential not just to executing bombing operations, but also to win and keep the hearts and minds of their supporters. This is the money that law enforcement must target to sap community support of the terrorists and to devitalize their attacks. The FATF Report recognizes that: “Even the best efforts of authorities may fail to prevent specific attacks. Nevertheless, when funds available to terrorists are constrained, their over-

⁵ Financial Action Task Force, Members & Observers, http://www.fatfgafi.org/pages/0,3417,en_32250379_32236869_1_1_1_1,00.html (last visited Feb.16, 2009).

⁶ Financial Action Task Force, History of the FATF, http://www.fatfgafi.org/document/63/0,3343,en_32250379_32236836_34432255_1_1_1_1,00.html (last visited Feb.16, 2009).

⁷ FINANCIAL ACTION TASK FORCE, *supra* note 2.

⁸ *Id.* at 7.

⁹ *Id.*

¹⁰ JOHN ROTH ET AL., NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING 19 (2004).

¹¹ *Id.* at 17.

all capabilities decline, limiting their reach and effect.”¹² This was brought home in 1995 by Ramzi Yousef, one of the terrorists captured after the 1993 World Trade Center bombing, as he was being flown over the twin towers on his way to a New York jail. When an FBI agent pointed out that the towers were still standing, Yousef replied, “They wouldn’t be if I had enough money and explosives.”¹³

There is no doubt that in the absence of an effective deterrent, passionate appeals such as “Islam is under attack” can bring in large amounts of money from sympathizers. However, there are limits to how far empathy goes, and for most ordinary people it does not stretch to the point of jeopardizing their personal savings. Even the most dedicated criminals are more concerned about losing their personal fortunes than spending time in jail. One of the best statements of this mindset came from Gaspare Mutolo, a Mafia don turned *pentito*,¹⁴ during his testimony before the Anti-Mafia Commission hearings held in Italy in 1992: “The worst feeling is when our money is taken away from us. People prefer to be put behind bars and keep their money than to stay free without the money. Money is the main thing.”¹⁵

Mutolo’s confession provides insight to a best practice: in order to dry up funding to terrorist organizations, authorities need to do more than just prosecute contributors and put them in jail. They must also freeze and confiscate the wealth of people who finance murder and terror. As discussed below, it is fortuitous from a global perspective that there has never been a better time to recover assets tainted by crime than now.

II. INTERNATIONAL DEVELOPMENTS IN ASSET RECOVERY

In the past, efforts by developing countries to recover stolen, corrupt, or illicit assets stored in foreign countries were long and complicated affairs. For example, the Philippines spent seventeen years in litigation before recovering \$658 million of the estimated \$3 billion looted and stashed overseas by former President Ferdinand Marcos.¹⁶

¹² *Id.* at 27.

¹³ James Risen & David Johnston, *A Day of Terror: Intelligence Agencies: Officials Say They Saw No Signs Of Increased Terrorist Activity*, N.Y. TIMES, Sept. 12, 2001, at A21.

¹⁴ The Italian word “pentito” refers to a former member of the Italian Mafia who provides testimony to law enforcement officials in exchange for protection, immunity, or both. *See, e.g.*, Antonio La Spina, *Recent Anti-Mafia Strategies: The Italian Experience*, in ORGANIZED CRIME: CULTURE, MARKETS AND POLITICS 200–01 (Dina Siegel & Hans Nelen, eds., 2008).

¹⁵ *Verballi della Commissione Parlamentare Antimafia* [Minutes of the Parliamentary Antimafia Commission], 11th Leg. 1236 (1993), available at http://www.liberliber.it/biblioteca/i/italia/verballi_antimafia_xi_legislatura/html/violante01/index.htm.

¹⁶ Simeon V. Marcelo, *The Long Road from Zürich to Manila: The Recovery of the Marcos Swiss Dollar Deposits*, in RECOVERING STOLEN ASSETS 89, 92 (Mark Pieth ed., 2008).

The historic practices of financial institutions, which stored stolen funds, explain the reasons behind lengthy and complicated recovery efforts. When a “victim” country tried to pursue corrupt assets, the institution storing the funds would interpose the well-established legal privilege of bank secrecy. That would frustrate the recovery effort absent an extraordinary intervention by the government of the “recipient” country. However, before the government of a recipient country would act, it would often require the victim country to first obtain a criminal judgment or other official determination against the alleged guilty party. Without help from the recipient countries, such determinations were difficult to obtain. How could the victim country demonstrate that there was stolen money stashed in the recipient country unless the recipient country helped by providing bank records and evidence? It was a vicious “catch 22.” Therefore, successful international efforts at asset recovery were few and far between. The inability to engage in effective asset recovery became a larger and larger problem for developing countries. When public officials opportunistically engaged in corruption—whether by stealing domestic tax revenues, skimming aid payments donated for development by non-governmental organizations (NGOs), international organizations or foreign governments, or taking kickbacks from sweetheart deals—storing those funds in foreign financial institutions provided a great deal of protection.¹⁷

As the developed world ignored the situation, corruption festered and retarded efforts to help developing countries grow out of poverty. In 2003, the United Nations reported that during the 1990s, a period in which people were relatively euphoric about global progress, “54 countries actually got poorer.”¹⁸ International organizations now uniformly agree that corruption has been a major impediment to social progress in developing countries for the past fifty years. The United Nations Development Programme (UNDP) states that “minimizing corruption is critical to reduce poverty and promote social and people-centered sustainable development,”¹⁹ and the World Bank identifies corruption as “the greatest obstacle to reducing [global] poverty.”²⁰ Both organizations resolved to move aggressively against corruption.

¹⁷ *Hearing on Offshore Banking, Corruption, and the War on Terrorism Before the H. Comm. on Int’l Relations*, 109th Cong. (2006), available at http://commdocs.house.gov/committees/intlrel/hfa26777.000/hfa26777_0.htm.

¹⁸ Jess Bravin, *Poor Nations Saw Living Standards Decline in 1990s*, WALL ST. J., July 9, 2003, at A2.

¹⁹ United Nations Development Programme, *Democratic Governance*, <http://www.undp.org/governance/sl-par.htm> (last visited Jan. 23, 2009).

²⁰ World Bank, *Anticorruption*, <http://www1.worldbank.org/publicsector/anticorrupt/index.cfm> (last visited Jan. 23, 2009).

As a result, the United Nations Office on Drugs and Crime (UNODC) led a worldwide effort to focus attention on attacking corruption, which culminated in 2003 with the adoption of the United Nations Convention against Corruption (UNCAC). With seventy-one articles containing numerous new and aggressive tools to combat corruption, the UNCAC is a remarkable document of unprecedented scope and application. The fact that 131 countries and the European Community have become parties to the Convention within a relatively short period of five years after its adoption is evidence of the growing global consensus against corruption.²¹

Recognizing the complicity of financial institutions in the concealment and laundering of corrupt and illegal assets, the UNCAC promulgated clear provisions applicable to banks. These included “know your customer” requirements, increased scrutiny of “politically exposed persons” and enhanced reporting mechanisms for suspicious transactions. Chapter 5 of the UNCAC is devoted entirely to “Asset Recovery,” and it begins with a powerful statement: “The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.”²²

The Convention facilitates the recovery of assets by requiring that states amend their laws to enable the confiscation of the proceeds of crime and revise their laws so that bank secrecy is no longer absolute. Article 31(7) of UNCAC provides that: “each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act . . . on the grounds of bank secrecy.”²³ A further boost for asset recovery came on September 17, 2007, when the UNODC joined forces with the World Bank and officially launched the Stolen Asset Recovery Initiative (StAR Initiative).²⁴ The StAR Initiative seeks to implement the Convention by helping countries build capacity for mutual legal assistance, creating partnerships to share information and expertise, and establishing a joint funding vehicle to provide assistance to states for asset recovery cases.²⁵

Whereas there used to be only a rocky trail fraught with hazards for the unwary, these developments demonstrate that the international community is working together to pave a clear highway for asset recovery. It is

²¹ United Nations Office on Drugs and Crime, Signatories to the United Nations Convention against Corruption, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Mar. 1, 2009).

²² United Nations Convention Against Corruption, art. 51, U.N. Doc. A/58/422 (Nov. 2003) [hereinafter UNCAC].

²³ *Id.* art. 31(7).

²⁴ Press Release, World Bank, World Bank and UNODC to Pursue Stolen Asset Recovery, 2008/061/PREM (Sept. 18, 2007), available at <http://go.worldbank.org/08LGHMJT10>.

²⁵ *Id.*

only a matter of time and political will before this highway is completed and cleared of construction hazards. There is no reason why the same highway cannot be used for the recovery of assets connected to terrorist activities in both criminal and civil courts. Article 35 of the UNCAC already requires State Parties “to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.”²⁶ Article 54(1)(a) requires each State Party “to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party.”²⁷ There is no policy justification for allowing these advanced asset recovery procedures and concepts in corruption cases and not in cases involving terrorism.

III. UNITED STATES CIVIL ACTIONS UNDER 18 U.S.C. 2333(A)

The United States has a number of criminal statutes addressing money laundering and terrorism which constitute the backbone of its legal arsenal to confront terrorism. The primary focus of this article, however, is on the effectiveness of civil procedures for recovering assets as a complementary tool to thwart financing of terrorism—most notably 18 U.S.C. § 2333(a),²⁸ which is grounded upon two criminal provisions 18 U.S.C. § 2339B²⁹ and 18 U.S.C. § 2339C.³⁰ Unlike criminal prosecutions, which

²⁶ UNCAC, *supra* note 13, art. 35.

²⁷ *Id.* art. 54(1)(a).

²⁸ 18 U.S.C. § 2333 (West 2007). Section 2333 was passed as part of the Anti-Terrorism Act of 1992 to enhance civil remedies for the victims of terrorism following the murder of Leon Klinghoffer aboard the hijacked ship *Achille Lauro*. See MARITIME TERRORISM AND INTERNATIONAL LAW 119-20 (Natalino Ronzitti ed. 2000). Section 2333(a) provides that:

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor [sic] in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.

18 U.S.C. § 2333(a) (West 2007). Federal courts—including the United States Court of Appeals for the Seventh Circuit and the Eastern District of New York—have held that “international terrorism” includes violations of 18 U.S.C. § 2339B and 2339C. *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1014–15 (7th Cir. 2002); see also *Linde v. Arab Bank*, 384 F.Supp 2d 571, 580 (E.D.N.Y. 2005) (setting forth the plaintiff’s claim that 18 U.S.C. §§ 2339B and 2339C are predicates of international terrorism); *Strauss v. Credit Lyonnais*, No. CV-06-0702, 2006 WL 2862704 at *1 (E.D.N.Y. 2006) (“Violations of 18 USC §2339B and §2339C are recognized as international terrorism under 18 USC 2333(a).”).

²⁹ Section 2339B provides that:

Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, [is guilty of a crime]. . . . To violate this paragraph, a person must have knowledge that the organization is a designated

are expensive for the government and take a long time, civil cases funded by private plaintiffs offer the government a relatively inexpensive and effective way to combat the financing of terrorists. The Justice Department's prosecution against the Holy Land Foundation, formerly the largest Islamic charity in the United States, illustrates the length and expense of criminal prosecutions involving terrorist financing.³¹

On July 27, 2004, a federal grand jury in Dallas, Texas, returned a forty-two count indictment against the Holy Land Foundation, with charges including conspiracy, providing material support to Hamas (a designated foreign terrorist organization), tax evasion and money laundering.³² However, on October 22, 2007, District Court Judge Joe Fish declared a mistrial because the trial jurors had become deadlocked on the most significant counts.³³ The Justice Department reduced its indictment against the Holy Land Foundation to thirty-two counts and a subsequent retrial resulted in guilty verdicts against the Holy Land Foundation and five of its leaders on November 24, 2008.³⁴

terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged in or engages in terrorism . . .

18 U.S.C. § 2339B(a)(1) (West 2007). Section 2339B(g)(4) indicates that "the term 'material support or resources has the same meaning as in section 2339A.'" 18 U.S.C. § 2339B(g)(4) (West 2007). According to Section 2339A, "the term 'material support or resources' means currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, and transportation, except medicine or religious materials." 18 U.S.C. § 2339A (West 2007).

³⁰ Section 2339C(a)(1), provides, in relevant part, that:

Whoever . . . , by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out . . . [an] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act, shall be punished . . .

18 U.S.C. § 2339C(a)(1) (West 2007). In this subsection, "provides" includes "giving, donating, and transmitting" and "collects" includes, "raising and receiving." See 18 U.S.C. § 2339C(e)(4)–(5) (West 2007).

³¹ Eric Lichtblau, *Islamic Charity Says F.B.I. Falsified Evidence Against It*, N.Y. TIMES, July 27, 2004, at A1.

³² Press Release, Dep't of Justice, Holy Land Foundation, Leaders, Accused of Providing Material Support to Hamas Terrorist Organization (July 27, 2004), available at http://www.usdoj.gov/opa/pr/2004/July/04_crm_514.htm.

³³ Jason Trahan & Michael Grabell, *Judge Declares Mistrial in Holy Land Foundation Case*, DALLAS MORNING NEWS, Oct. 22, 2007, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/102207dnmetholyland.1878fd716.html>.

³⁴ Jason Trahan & Tanya Eiserer, *Holy Land Foundation Defendants Guilty on All Counts*, THE DALLAS MORNING NEWS, Nov. 25, 2008, available at <http://www.dallasnews.com/sha>

The Justice Department intends to use the Holy Land case, which is the largest terrorist financing prosecution in history, as a “portable blueprint” for future prosecutors to turn “traditional and massive intelligence cases” into successful criminal prosecutions.³⁵ Supporters of the Holy Land Foundation charge that the entire prosecution is but one of numerous examples of the government’s overreaching in trying to stop terrorism financing, and the case may not be over. Nancy Hollander, lawyer for defendant Mr. Abu-Baker, said that her client intends to appeal on due process grounds, including that the government improperly used anonymous testimony of an expert.³⁶

While the Holy Land Foundation case appears to be a substantial victory for the government, it cost millions of taxpayer dollars, fifteen years of investigation, and two long trials to obtain the guilty verdicts. Concerns about just such difficulties of proof and expense of proceedings have prompted some trial specialists to urge that Justice Department prosecutors look to making greater use of civil statutory tools against terrorists financing in lieu of criminal proceedings.³⁷ An article published in the March 2005 United States Attorney’s Bulletin presented a lengthy exposition on that issue.³⁸ The article listed the numerous advantages of using civil procedures in lieu of criminal procedures, including:

- more efficient allocation of scarce law enforcement resources;
- less resource intensive evidence gathering procedures;

redcontent/dws/dn/latestnews/stories/112508dnmetholylandverdicts.1e5022504.html.

³⁵ Jason Trahan, *Holy Land verdict could be Boost for Obama’s War on Terror*, THE DALLAS MORNING NEWS, Jan. 7, 2009, available at <http://www.dallasnews.com/sharedcontent/dws/news/washington/stories/010709dnnatobamaterror.3c26567.html>.

³⁶ Abdus Sattar Ghazali, *The Holy Land Foundation Retrial Ends with Conviction of its Five Former Officials*, AMERICAN MUSLIM PERSPECTIVE, Nov. 26, 2008, http://archives2008.ghazali.net/html/holy_land_verdict.html.

³⁷ Some Department of Justice lawyers advocate using “traditional” criminal money laundering statutes for prosecuting complex cases rather than recently passed terrorist statutes. See, e.g., Stefan Cassella, *Terrorism and the Financial Sector: Are the Right Prosecutorial Tools Being Used*, 7 J. OF MONEY LAUNDERING CONTROL 281 (2004). One example is 18 U.S.C. § 1956(a)(2)(A), which makes it a crime to send money out of the United States with the intention of promoting another crime, including inciting violence in a foreign country. See 18 U.S.C. § 1956(a)(2)(A) (West 2007). Property traceable to a violation of 18 U.S.C. § 1956(a)(2)(A) is subject to both civil and criminal forfeiture under 18 U.S.C. §§ 981 and 982, and the combination of these provisions could be easier to apply and create the same material impact on terrorist financiers as more recently added anti-terrorism statutes. To address people who are smuggling large sums of money out of the country to terrorists or anyone else, the simplest alternative might be to charge them with a conspiracy to violate 18 U.S.C. § 1960 by operating a money remitting business without a license. Conviction carries a possible five-year prison term and forfeiture of any property used in the offense.

³⁸ See Darrell D. Dorrell & Gregory A. Gadawski, *Counterterrorism: Conventional Tools for Unconventional Warfare*, U.S. ATT’YS. BULL., Mar. 2005, at 1.

- easier use of publicly available information sources;
- less stringent chain of custody requirements;
- achievement of more rapid results because of evidentiary considerations, and availability of summary judgments and injunctions;
- use of the “clear and convincing evidence” and “preponderance of evidence” standards of proof which are less rigorous than the “beyond a reasonable doubt” standard required in criminal proceedings; and
- increased flexibility to employ third parties as consultants, contractors and witnesses.³⁹

The authors of that article point out that, like drug dealers migrating to different money-laundering techniques as law enforcement closes older ones, terrorists will progress to the next avenue—businesses, real and sham—that can facilitate funds flow. They make a persuasive case that traditional civil techniques of proving misconduct such as alter ego, fraudulent conveyance and solvency analysis will help law enforcement to keep pace with the evolution towards ever more covert and convoluted structures.⁴⁰ Of course, these same considerations and techniques are equally available to victims of terrorism seeking redress under 18 U.S.C. § 2333.

The effectiveness of civil proceedings against the funders of terrorism is currently being tested in a 2002 civil lawsuit against an array of individuals and organizations in the United States (including the Holy Land Foundation) with alleged connections to the militant group Hamas. In December 2004, a federal jury in Chicago, Illinois, found the defendants liable for \$156 million for providing material support to Hamas.⁴¹ Hamas allegedly murdered a seventeen-year-old American citizen named David Boim as he waited at a bus stop outside Jerusalem in 1996.⁴² A three-judge panel of the U.S. Court of Appeals for the Seventh Circuit reversed the judgment for a number of reasons including that the plaintiffs had failed to demonstrate an adequate causal link between the actions of the defendants and David Boim’s murder.⁴³ Circuit Judge Evans dissented in part, noting: “The plaintiffs’ burden in this civil suit was to prove their case by a mere preponderance of the evidence, and that, I think, they have accomplished.”⁴⁴

On June 16, 2008, the decision of the three-judge panel of the Seventh Circuit was vacated, and the case was set for argument before the

³⁹ See *id.* at 4.

⁴⁰ See *id.* at 36.

⁴¹ See *Boim v. Quranic Literacy Institute*, 340 F. Supp. 2d 885 (N.D. Ill. 2004); Gretchen Ruethling, *Judge Awards \$156 Million in Terror Death*, N.Y. TIMES, Dec. 9, 2004, at A4.

⁴² *Id.*

⁴³ *Boim v. Holy Land Foundation*, 511 F. 3d 707,756 (7th Cir. 2007).

⁴⁴ *Id.* at 760, n.1.

court en banc.⁴⁵ The Seventh Circuit invited parties to file supplemental briefs addressing “[w]hether a donor to an organization that, the donor knows, practices terrorism, can be liable under 18 USC 2333(a) in the absence of proof that the donor intended to advance the violent component of the recipient’s activities.”⁴⁶

On December 3, 2008, the Seventh Circuit, sitting *en banc* affirmed the \$156 million jury verdict against two of the appellants, reversed with instructions to enter judgment in favor of one of the appellants, and reversed and remanded for further proceedings against the last appellant.⁴⁷ As to the question of intent under 18 U.S.C. § 2333(a), the majority opinion held that “Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization’s terrorist activities.”⁴⁸ The majority provided the following two justifications:

The first is the fungibility of money. If Hamas budgets \$2 million for terrorism and \$2 million for social services and receives a donation of \$100,000 for those services, there is nothing to prevent its using that money for them while at the same time taking \$100,000 out of its social services “account” and depositing it in its terrorism “account.”

Second, Hamas’s social welfare activities reinforce its terrorist activities both directly by providing economic assistance to the families of killed, wounded, and captured Hamas fighters and making it more costly for them to defect (they would lose the material benefits that Hamas provides them), and indirectly by enhancing Hamas’s popularity among the Palestinian population in providing funds for indoctrinating schoolchildren.⁴⁹

The en banc decision in the *Boim* case appears to have cleared away the major obstacles complicating the use of section 2333(a) against the funders of terrorism. Even should the U.S. Supreme Court choose to grant certiorari to assess the intent issue with regard to section 2333(a), it seems unlikely that the Court would require proof of intent to fund terrorist activities for these cases. Such a ruling would create the absurd result of permitting every defendant to escape liability simply by claiming that the donations were “intended” solely for the social activities of the terrorist group and not for its killing enterprises. The law is not so blind or powerless.

There is no conflict between circuit courts about the issue of intent under section 2333(a). In fact, the *Boim* en banc decision is squarely in ac-

⁴⁵ *Boim v. Holy Land Found.*, No. 00 C 2905, 2008 U.S. App. LEXIS 12925 (7th Cir., June 16, 2008) (vacating judgment and granting rehearing en banc).

⁴⁶ *Id.*

⁴⁷ *Stanley Boim v. Holy Land Foundation*, No. 05-1815, slip op. (7th Cir. 2008).

⁴⁸ *Id.* at 25.

⁴⁹ *Id.* at 24–25.

cord with the decision by the Ninth Circuit in *United States v. Afshari*.⁵⁰ In *Afshari*, the Ninth Circuit rejected the argument that citizens should be allowed to contest the correctness of terrorist designations before they can be found criminally liable for providing material support under 18 U.S.C. § 2333B, one of the predicate statutes underlying 18 U.S.C. § 2333(a). The question is not whether the designation was correct (procedures are available for the designated entity to litigate that issue), or whether some citizens might not agree with the designation, or whether some people might still want to support social services provided by the organization in spite of the government's determination.⁵¹ The government has the responsibility and authority to make those designations, and if the donor knows about the designation, a violation occurs whenever a donation is made, regardless of the intent or desire of the donor.

There is no dispute that violations of both 18 U.S.C. § 2339B and § 2339C are covered by 18 U.S.C. § 2333(a). Sections 2339B and 2339C contrast sharply with regard to an intent requirement. Section 2339B has no "intention" clause: "Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be imprisoned for any term of years or for life."⁵² Section 2339C has an explicit "intention" requirement: "Whoever . . . willfully provides or collects funds *with the intention* that . . . such funds are to be used, in full or in part, in order to carry out . . . [an] act intended to cause death or serious bodily injury to a civilian . . . shall be punished"⁵³

It is obvious that when Congress wants to require a prior intention, it knows how to insert the relevant language. That it did not do so in Section 2339B implies that Congress expected that once an organization has been designated a terrorist organization, persons would be entirely prohibited from contributing anything of value to it regardless of the donor's motive or intent. That policy is sensible because donations to terrorist groups for social purposes are subtly sinister. They enable the organization to pose as an honorable humanitarian group, thereby increasing its support in the community for the benefit all of its operations, including the execution of terror attacks. Congress was not trying to create a loophole for terrorist organizations—it was trying to strangle them out of existence. That will not happen if people are permitted to ignore the fungibility of money and continue to

⁵⁰ See *United States v. Afshari*, 426 F.3d 1150 (9th Cir. 2005), *cert. denied*, *Rahmani v. United States*, 127 S. Ct. 930 (2007).

⁵¹ *Id.* at 1162 ("The Constitution does not forbid Congress from requiring individuals, whether they agree with the Executive Branch determination or not, to refrain from furnishing material assistance to designated terrorist organizations during the period of designation.").

⁵² 18 U.S.C. § 2339B(a)(1) (West 2007).

⁵³ 18 U.S.C. § 2339C(a)(1) (West 2007) (emphasis added).

make donations to terrorist organizations to conduct so-called peaceful or social operations with their left hands while committing mayhem and murder on multitudes of innocent civilians with their right hands.

IV. ADDITIONAL CIVIL TOOLS FOR DISRUPTING TERRORIST INFRASTRUCTURES

Over time persistent attacks on the financial underpinnings of terrorist organizations can lead to their collapse. Perhaps the best example of this is the pioneering work of the Southern Poverty Law Center (SPLC), which was established in 1979 in Montgomery, Alabama. Over the last 30 years the SPLC has shut down some of America's largest hate organizations by helping victims of racist violence sue for monetary damages. The most prominent domestic terrorist organization in the United States during the 20th century was the Ku Klux Klan (KKK). In its second resurgence during the Civil Rights movement of the 1960s, the KKK had thousands of members, and perpetrated hundreds of hate crimes and murders primarily across the rural American South. Yet the KKK was eventually brought to its knees, not by battalions of soldiers, but instead by a small, dedicated group of non-government trial lawyers litigating civil actions often in conjunction with parallel criminal proceedings. The following cases illustrate SPLC's successes:

• *Donald v. United Klans of America*.⁵⁴ In 1981, several members of the Alabama chapter of the KKK, the United Klans of America (UKA), were charged for the murder of Michael Donald, a nineteen-year old African American who had been beaten to death and left hanging from a tree in Mobile, Alabama.⁵⁵ After criminal charges were filed against individual Klansmen, the men implicated in the murder quickly turned on each other. Morris Dees, the Director for the Southern Poverty Law Center (SPLC) went after the UKA's assets, linking their policies and practices to Donald's murder.⁵⁶ A jury found the Klan organization guilty and subsequently ordered it to pay \$7 million in damages to the victim's mother.⁵⁷ As the UKA did not have sufficient assets to pay the damages, the victim's mother received the deed to the UKA's national headquarters in Tuscaloosa,

⁵⁴ *Donald v. United Klans of America*, No. 84-0725 (S.D. Ala. Feb. 12, 1987), available at http://www.splcenter.org/pdf/dynamic/legal/beulahvunklan_judgment.pdf.

⁵⁵ See *Klan Member Put to Death in Race Death*, N.Y. TIMES, June 6, 1997, at A24.

⁵⁶ See Associated Press, *U.S. Jurors Award \$7 Million Damages in Slaying by Klan*, N.Y. TIMES, Feb. 13, 1987, at A1.

⁵⁷ See *id.*

Alabama which had a market value of \$225,000.⁵⁸ The loss of the property was devastating to the UKA.⁵⁹

• *Macedonia Baptist Church v. Christian Knights of the Ku Klux Klan*.⁶⁰ In 1998, a civil lawsuit filed by the SPLC in response to the burning of an African-American church in South Carolina resulted in \$37.8 million being awarded against several Klan organizations and individuals. This was the largest judgment against a hate group in the United States, and although the award was later reduced to \$21.5 million, it forced the Klan to give up its land and headquarters and “transformed the Christian Knights from one of the most active Klan groups in the nation to a defunct organization.”⁶¹

• *Gruver v. Imperial Klans of America*.⁶² In 2008, a jury awarded \$2.5 million in damages to a Kentucky teenager who was severely beaten by members of the Imperial Klans of America because the Klansmen mistakenly thought he was an illegal Latino immigrant. The SPLC is seeking to enforce the judgment by seizing the group’s assets, including its headquarters, a 15 acre compound in Dawson Springs, Kentucky.⁶³

Tactics similar to SPLC’s are now being employed in the United Kingdom. On April 2008, a Belfast, Ireland court began hearing a \$21 million civil case against five men alleged to have been responsible for the paramilitary car bomb attack carried out by the Real Irish Republican Army (RIRA), on August 15, 1998, in Omagh, Northern Ireland.⁶⁴ Twenty-nine people died as a result of the attack and approximately 220 people were injured. In other instances, the British government is succeeding in squeezing terrorist financing through criminal means. For example, on October 17,

⁵⁸ See *id.*; see also Anti-Defamation League, *Decline of the United Klans of America*, http://www.adl.org/issue_combating_hate/UKA/decline.asp (stating market value of headquarters).

⁵⁹ Anti-Defamation League, *Decline of the United Klans of America*, http://www.adl.org/issue_combating_hate/UKA/decline.asp.

⁶⁰ *Macedonia v. Christian Knights of the Ku Klux Klan*, No. 96-CP-14-271, (S.C. Ct. of C.P. July 24, 1998), available at http://www.splcenter.org/pdf/dynamic/legal/macedoniavkkl_judgment.pdf.

⁶¹ Southern Poverty Law Center, *Macedonia v. Christian Knights of the Ku Klux Klan: Church Burning Case*, <http://www.splcenter.org/legal/docket/files.jsp?cdrID=29> (last accessed Feb. 2, 2009).

⁶² *Gruver v. Imperial Klans of America*, 07-CI-00082, (Ky. Cir. Ct. Nov. 20, 2008), available at <http://www.splcenter.org/legal/docket/files.jsp?cdrID=69&sortID=0>.

⁶³ See Ann O’Neill, *Jury awards \$2.5 Million to Teen Beaten by Klan Members*, CNN, Nov. 14, 2008, <http://edition.cnn.com/2008/CRIME/11/14/klan.sued.verdict/index.html>.

⁶⁴ Tom Peterkin & Emma Henry, *Omagh Bombing: Civil Case Opens in Belfast*, TELEGRAPH (U.K.), available at <http://www.telegraph.co.uk/news/uknews/1584193/Omagh-bombing-Civil-case-opens-in-Belfast.html>.

2008, in an agreed legal settlement, an alleged former leader of the IRA, Thomas “Slab” Murphy, and his two brothers paid over £1 million in properties and cash to the authorities in Britain and Ireland in settlement of a global crime and fraud investigation in relation to proceeds of crime associated with smuggling and money laundering. In another action reminiscent of the United States proceedings against the infamous Chicago mobster Al Capone, Murphy is fighting a claim in the Irish courts for tax evasion, relating to non-completion of tax returns for eight years from 1996.⁶⁵

In America, victims of terrorist acts have had legislative authority to sue certain state sponsors of terrorism since 1996 when Congress amended the Foreign Sovereign Immunities Act (FSIA).⁶⁶ United States courts have awarded victims of terrorism more than \$19 billion against state sponsors of terrorism and their officials, most of which remains uncollected.⁶⁷ As part of a rapprochement with Libya in August 2008, the United States Department of State settled existing private terrorism claims against Libya for \$1.5 billion, an amount which did not please a number of the private plaintiffs.⁶⁸ Nevertheless, many people believe that these kinds of private actions do have an influence on state behavior. For example, in a suit against the Islamic Republic of Iran for its role in the 1983 bombing of the United States Marine Corps barracks in Beirut Lebanon, Dr. Patrick Clawson, deputy director of the Washington Institute for Near East Policy, testified that civil judgments for acts of state-sponsored terrorism have had a noticeable impact upon the present regime in Iran.⁶⁹

Foreign organizations are beginning to recognize that they cannot easily ignore civil suits brought against it in United States courts. In 2008, the Palestine Liberation Organization (PLO), which is not a foreign state, requested a court to vacate a section 2333(a) default judgment against it and allow it an opportunity to defend the case on the merits.⁷⁰ The motion was

⁶⁵ *Republican Slab Murphy ordered to give up 1 million pounds*, BELFAST TELEGRAPH, Oct. 18, 2008, available at <http://www.belfasttelegraph.co.uk/news/local-national/republican-slab-murphy-ordered-to-give-up-pound1million-14007463.html>.

⁶⁶ 28 U.S.C. §§ 1602 *et seq.* (West 2007).

⁶⁷ See Jennifer K. Elsa, *Suits against Terrorist States by Victims of Terrorism*, CRS Report for Congress, Aug. 8, 2008, available at <http://www.fas.org/sgp/crs/terror/RL31258.pdf>.

⁶⁸ See Kimberly Kindy, *Families Who Sued Libya See Their Victory Voided*, WASH. POST, Dec. 23, 2008, at A3.

⁶⁹ See *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 58 (D.D.C.2003). In 2007 a \$2.65 billion judgment was entered against Iran. *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C., 2007).

In 2008, garnishment writs were issued against BP, Shell, Vitol and Venezuela's state owned oil company ordering them to hold onto any assets belonging to the Iranian government. See Cindy George, *Federal Judge in Houston Joins Iran Collection Case*, HOUSTON CHRONICLE, June 22, 2008, at B4.

⁷⁰ *Knox v. The Palestine Liberation Organization*, 248 F.R.D. 420 (S.D.N.Y. 2008).

granted, but with a requirement that the PLO post a bond for \$192.7 million, the full amount of the earlier default judgment.⁷¹

It may prove easier to recover on judgments against organizations found in the chain of terrorist financing than those against state sponsors of terrorism. A number of private attorneys have filed cases that extend the reach of 18 U.S.C. § 2333(a) beyond just charitable organizations. For instance, victims of terrorist attacks have filed a series of lawsuits against banks alleged to have provided financial services to terrorist groups.⁷² It is clear from a review of regulatory enforcement actions that a number of banks have failed to implement sufficient controls on high-risk accounts to safeguard against money-laundering, corruption and terrorist financing.⁷³ These controls are important protections against crimes such as drug trafficking and terrorism. If a bank has allowed them to lapse, it may be exposing itself to liability to private lawsuits under 18 U.S.C. § 2333. This potential liability, if nothing else, creates a strong incentive for banks to tighten their compliance procedures, thereby cutting off the flow of money to terrorists through formal banking channels.

A good example is *Linde v. Arab Bank*,⁷⁴ one of nine similar lawsuits against Arab Bank. Arab Bank is one of the largest banks in Jordan with \$27 billion in assets and branches in Europe, and until recently, in the United States.⁷⁵ In July 2004, six American families who were victims of Palestinian terrorism in Israel during the Al-Aqsa Intifada in September 2002 sued Arab Bank for \$875 million under the provisions of 18 U.S.C. § 2333. Plaintiffs claimed that Arab Bank had dispersed millions of dollars of support payments to families of suicide bombers, thereby encouraging further attacks.⁷⁶ Because Arab Bank routed the money through its New York office in order to convert into U.S. currency, the State of New York had jurisdiction. As motions to dismiss were denied on September 2, 2005, the case is currently proceeding through discovery to trial.⁷⁷

After the *Linde* case was filed in July 2004, the Office of the Comptroller of the Currency (OCC) investigated Arab Bank's New York

⁷¹ *Id.* at 431.

⁷² Steve Anderson, *Dirty Banking: Financial Institutions Face Suits Over Alleged Antiterrorism Act Violations*, INSIDE COUNSEL, May 1, 2008, at 38.

⁷³ See, e.g., FINANCIAL CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, ENFORCEMENT ACTIONS, http://www.fincen.gov/news_room/ea/ (last visited Jan. 23, 2009).

⁷⁴ See *Linde v. Arab Bank*, 384 F. Supp. 2d 571, 575–76 (E.D.N.Y. 2005).

⁷⁵ *In re Fed. Branch of Arab Bank, Assessment of Civil Money Penalty*, No. 2005-2, 1 (Dep't of Treasury, Aug. 17, 2005), available at http://www.fincen.gov/news_room/ea/files/arab081705.pdf.

⁷⁶ *Linde*, 384 F. Supp. 2d 571, 575–79.

⁷⁷ See *id.* at 591.

branch.⁷⁸ A Consent Order issued on February 24, 2005, required Arab Bank to reduce the banking activities of its New York branch and shut down its wire transfer operations.⁷⁹ On August 17, 2005, the Financial Crimes Enforcement Network entered into a Consent Order with Arab Bank that levied a \$24 million dollar fine against the Bank for “fail[ing] to implement an adequate system of internal controls to comply with the Bank Secrecy Act and manage the risks of money laundering and terrorist financing.”⁸⁰ On May 11, 2005, NBC News reported that the FBI and the Justice Department had opened a criminal investigation into the Bank’s activities.⁸¹ It appears at least in this instance, Section 2333 is working as it was intended.

Of course, Section 2333 is not the only route to liability for organizations involving themselves in the financing of terrorist organizations. In *Almog v. Arab Bank*,⁸² one of the sister cases to *Linde*, the Court upheld the ability of foreign nationals to sue Arab Bank in federal court under the Alien Tort Claims Act, 28 U.S.C. § 1350, for causes of action including violating the law of nations by financing suicide bombings by Hamas and other terrorist groups, and aiding and abetting in the execution of crimes against humanity.

In addition to charities and banks, private companies have also found themselves targets of Section 2333. Over a half dozen complaints seeking billions of dollars in damages have been filed in the District Courts in Miami and New York against Cincinnati-based Chiquita Brands International, accusing the well-known banana grower of providing terrorists with money, guns and ammunition.⁸³ In March 2007, “Chiquita agreed to pay a \$25 million fine to settle a criminal complaint with the U.S. Justice Department, which accused it of paying the United Self-Defense Forces of Colombia, known by its Spanish acronym AUC, more than \$1.7 million from 1997 to 2004.”⁸⁴ The U.S. government had previously designated the AUC as a

⁷⁸ *In re Fed. Branch of Arab Bank*, Consent Order No. AA-EC-05-12 (February 24, 2005), available at <http://occ.gov/FTP/EAs/ea2005-14.pdf>.

⁷⁹ *Id.*

⁸⁰ *In re Fed. Branch of Arab Bank*, Assessment of Civil Money Penalty, No. 2005-2, 4 (Dep’t of Treasury, Aug. 17, 2005), available at http://www.fincen.gov/news_room/ea/files/arab081705.pdf.

⁸¹ *NBC Nightly News: Terror Ties At a Middle Eastern Bank?* (NBC television broadcast May 11, 2005).

⁸² *Almog v. Arab Bank*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

⁸³ Press Release, Dep’t of Justice, Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay \$25 Million Fine (Mar. 19, 2007), available at http://www.usdoj.gov/opa/pr/2007/March/07_nsd_161.html.

⁸⁴ Christine Kearney, *Chiquita Sued in NY Over Killings in Colombia*, REUTERS, Nov. 14, 2007, <http://www.reuters.com/article/americasCrisis/idUSN14211578>.

foreign terrorist organization.⁸⁵ Chiquita says that it “was forced to make such payments to both left- and right-wing organizations to protect the lives of our employees at a time when kidnappings and murders were frequent.”⁸⁶ In view of the strenuous efforts of the United States and other governments to suppress the AUC and the FARC (*Fuerzas Armadas Revolucionarias de Colombia*), one cannot help but wonder why it was so important for Chiquita to give the terrorists sustenance. It would be better to have quit the area completely than give millions of dollars to terrorist groups, which would use the money to buy guns and explosives to murder and kidnap innocent people.

CONCLUSION

It is apparent that asset recovery actions are becoming an important part of the solution to two of the worst problems plaguing the world: terrorism and corruption. The United States can push the frontiers of asset recovery but it cannot achieve success against either problem on its own. The tentacles of terrorism stretch into many countries, and the U.S. can never make itself safe without doing the same for others. Full and complete success requires international cooperation, and unfortunately that cooperation has been declining. Currently, “[t]he most serious problems [have come from] fractures and mistrust within the coalition . . . that the United States admits that it needs. . . . [Due to] changing political climates and [increasingly] negative perceptions of the United States, key allies are cooperating less.”⁸⁷ Even the Saudi government, a key U.S. ally, has failed to follow through on its agreement to establish basic reporting mechanisms such as a financial intelligence unit.⁸⁸ In Kuwait, financing terrorists is not even a criminal offense, and the United Arab Emirates has not convicted a single person for terrorist financing or money laundering.⁸⁹ Rebuilding the focus and energy behind this coalition must be a priority for President Barack Obama if efforts at disrupting counter-terrorist financing are to continue.

Despite significant challenges, asset recovery holds great promise as a tool to disrupt terrorist finances. Unlike other counter-terrorism measures, asset recovery has one unique benefit—it can be profitable. The Federal Deposit Insurance Corporation (FDIC) has recovered over \$6 billion over the past fifteen years pursuing litigation against persons whose negli-

⁸⁵ U.S. State Dep’t, 2001 Report on Foreign Terrorist Organizations (Oct. 5, 2001), available at <http://www.state.gov/s/ct/rls/rpt/fto/2001/5258.htm>.

⁸⁶ *Id.*

⁸⁷ Josh Meyers, *Terrorism Money is Still Flowing*, L.A. TIMES, Mar. 24, 2008, at A1,

⁸⁸ Josh Meyers, *Saudis faulted for funding terror*, L.A. TIMES, Apr. 2, 2008, at A8

⁸⁹ U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2007 116–118 (2008), available at <http://www.state.gov/documents/organization/105904.pdf>.

gence or misconduct contributed to the failure of over 700 financial institutions.⁹⁰ Much of this money came from aiders and abettors, including accountants and lawyers whose inattention or complicity contributed to bank failures.⁹¹ The government of the Philippines has recovered over \$650 million from Swiss, British, and Liechtenstein banks holding accounts created by Former Philippine President Marcos.⁹² The Government of Peru has recovered over \$174 million stashed in foreign banks by “Vladimiro Montesinos, the de facto chief of intelligence and main adviser to former Peruvian President Alberto Fujimori from 1990 to 2000.”⁹³ Lastly, \$1.2 billion has been repatriated from the family of General Sani Abacha back to his homeland, Nigeria.⁹⁴

These are recent developments—all occurred within the last six years, and the interesting thing is that most of these recoveries were achieved using civil proceedings, not criminal. There is money out there and it can be recovered, but it may take more commitment and resources than many governments can allot. The solution is to tap into the more massive resources of the private sector. Private attorneys abhor terrorism every bit as much as government attorneys and as discussed above, civil procedures are often more effective than criminal procedures. Two famous examples of this are the OJ Simpson case and the Robert Blake case.⁹⁵ Both celebrities were acquitted in criminal prosecutions for the murders of their wives, but were later held liable for multi-million judgments in civil proceedings.⁹⁶

Government prosecutors have traditionally taken a dim view of providing information to civil plaintiffs because of concern that parallel

⁹⁰ See Jack Smith, *Anti-Corruption Foes Intensify Focus on Bank Compliance*, ACAMS TODAY, March/April, 2008, at 31.

⁹¹ See *Lincoln Savings & Loan Ass’n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990). Illustrating the complicity of attorneys and accountants, Judge Stanley Sporkin asked during the banking crisis of the 1990s, “Where were the outside accountants and lawyers when these transactions were effectuated?” *Id.*

⁹² Marcelo, *supra* note 7, at 92; see also Seth Myers, *The World: Recovering Marcos Assets Proves Trying for Aquino*, N.Y. TIMES, Nov. 18, 1990, at Week in Review 2 (referencing Liechtenstein as one of the sources from which the assets from the Philippines were recovered).

⁹³ Guillermo Jorge, *The Peruvian Efforts to Recover Proceeds from Montesinos’s Criminal Network of Corruption*, in RECOVERING STOLEN ASSETS 111–12 (Mark Pieth ed., 2008).

⁹⁴ See Tim Daniel & James Maton, *Recovering the Proceeds of Corruption: General Sani Abacha—A Nation’s Thief*, in RECOVERING STOLEN ASSETS 63, 67–69 (Mark Pieth ed., 2008).

⁹⁵ *Goldman Family Gets Rights to O.J. Book*, ABC News, July 31, 2007, <http://www.abc.net.au/news/stories/2007/07/31/1992929.htm?section=entertainment>; *Court Cuts Robert Blake’s wrongful death judgment*, Reuters Business and Finance, April 26, 2008, available at <http://www.reuters.com/article/newsOne/idUSN2641618920080426>.

⁹⁶ *Goldman Family Gets Rights to OJ Book*, ABC NEWS, July 31, 2007, <http://www.abc.net.au/news/stories/2007/07/31/1992929.htm?section=entertainment>; *Court Cuts Robert Blake’s Wrongful Death Judgment*, REUTERS, Apr. 26, 2008.

civil proceedings could unduly complicate criminal actions. However, it may be time to take a more enlightened view because of the pressing need to stop terrorist financing and the limitations on resources that the government can bring to bear. As a result of the growing savings and loan crisis of the late 1980s, Congress changed the grand jury secrecy laws to allow disclosures of grand jury materials to federal and state financial institution regulators.⁹⁷ Similar changes should be implemented now for terrorist financing cases brought in civil courts, and prosecutors should become more open to sharing information with private attorneys as appropriate on a case-by-case basis.

In the final analysis, the most important result of an aggressive asset recovery program is not the amount of money recovered: it is the establishment of a substantial deterrence factor against future wrongdoing. Other than personal ethics, it is only the prospect of losing your life savings and possibly going to jail that causes people to resist the temptation of contributing to sympathetic sounding terrorist appeals. It is impossible to expect law enforcement to stop every terrorist attack. However, by applying pressure to the funding sources of terrorist organizations, it is possible to restrict their capability to recruit and operate, and eventually vitiate their ability to remain relevant.

⁹⁷ 18 U.S.C. § 3322 (West 2007).